In the

Supreme Court of the United States

October Term of 1967
No. 486

J. DAVID STERN,
Appellant

vs.

SOUTH CHESTER TUBE COMPANY,
Respondent

APPENDIX

DAVID FREEMAN,
RICHARD H. WELS,
Attorneys for Appellant.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 31,033

J. David Stern,
Plaintiff

and

Sophie L. Siegel,
Intervenor

vs.

South Chester Tube Company,
Defendant

I.

RELEVANT DOCKET ENTRIES

Date

1962

Feb. 20, Complaint filed.

Apr. 10, Answer filed.

Docket Entries

1963

Apr. 5, Order of Court Denying motion of J. D. Stern for summary judgment under Rule 56 filed. 4-8-63 noted and copies mailed. RCB

1965

Jan. 6, Defendant's motion to dismiss filed.

May 12, Nonjury Trial. Witnesses sworn. JMD

1966

Mar. 21, Opinion, Davis, J. and Order Granting deft's. motion to dismiss the complaint for lack of jurisdiction over the subject matter filed. 3-22-66 entered and notice mailed. JMD

Apr. 1, Order of Court amending footnote 2 of the opinion of March 21, 1966 filed. 4-4-66 entered and copies mailed. JMD

II.

COMPLAINT

1. Jurisdiction is founded on diversity of citizenship and amount. Plaintiff is a citizen of the State of New York. Defendant, South Chester Tube Company, is a corporation duly incorporated under the laws of the State of Pennsylvania, engaged in business and maintaining an office for the conduct of its business in the County of Delaware, State of Pennsylvania. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. Defendant owns all the capital stock of, and completely controls the following corporations:

(a) Chester Tidewater Terminal, Inc., a corporation duly incorporated under the laws of the State of Pennsylvania.

(b) Dodge Steel Company, a corporation duly incorporated under the laws of the State of Pennsylvania.

(c) South Chester Corporation, a corporation duly incorporated under the laws of the State of Delaware.

(d) Lion Fastener Company, Inc., a corporation duly incorporated under the laws of the State of Delaware.

3. All of the aforesaid companies are engaged in business within the State of Pennsylvania and within the jurisdiction of this Court. All of the records of the aforesaid companies are located within the jurisdiction of this Court.

4. Plaintiff is the owner of 62 shares of the capital stock of the defendant. The value of said stock is in excess of the sum of $10,000.00.

5. Plaintiff has often requested permission of defendant to inspect its share register, its books of account and records of account, the records of proceedings of its shareholders and directors, and the books and records of account of its subsidiaries, but the defendant has always refused to permit such inspection.

6. Plaintiff has requested such inspection and now seeks such inspection in order to ascertain:

(a) the holdings of the corporation.

(b) the exact value of his holdings in the corporation.

(c) whether the affairs of the corporation were and are properly conducted.

(d) whether proper dividends are being paid by the corporation.

7. Plaintiff seeks inspection especially because:

(a) the information furnished by the defendant has been insufficient to disclose its true financial condition.

(b) the company has paid the same dividend of $10.00 per share for the past seven years, although its holdings and operations have greatly increased.

(c) the District Director of Internal Revenue for the Eastern District of Pennsylvania has caused proceedings to be instituted under section 102 of the Internal Revenue code of the United States against the defendant for the collection of taxes on undistributed profits of the defendant corporation.

Wherefore, plaintiff requests that this Court order the defendant to permit plaintiff to examine the share register, the books of account and records of the defendant, the records of proceedings of its shareholders and directors, and the books and records of account of its subsidiary corporations.

David Freeman
Attorney for Plaintiff

III.

ANSWER

Answering the averments contained in the complaint, defendant South Chester Tube Company by its attorneys replies thereto in accordance with the numbered paragraphs thereof as follows:

1. It is admitted that plaintiff avers that jurisdiction is founded on diversity of citizenship and amount in controversy, and it is further admitted that defendant is a corporation duly incorporated under the laws of the Commonwealth of Pennsylvania. Defendant is without sufficient information or knowledge to form a belief as to the citizenship of plaintiff and as to whether the amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000, and it therefore denies said averments and demands proof thereof at trial.

2. It is admitted that defendant owns all of the outstanding capital stock of the corporations listed in subparagraphs (a), (b), (c), and (d), but it denies the conclusion that it completely controls those corporations; to the contrary, those corporations, each of which operates as a separate entity producing separate products at separate locations, are managed and controlled by their respective board of directors and officers.

3. It is admitted that defendant and the other corporations listed in paragraph 2 of the complaint are engaged in business within the Commonwealth of Pennsyl-

vania and that all of the records of those corporations, with the exception of those of Lion Fastener Company, Inc., the facilities of which are located in New York State, are located within the Commonwealth of Pennsylvania; the records of Lion Fastener Company, Inc., are located in both Pennsylvania and New York.

4. It is admitted that plaintiff is the record owner of 62 shares of the capital stock of defendant; it is admitted that the aggregate value of said shares is in excess of $10,000, but it is denied that the value thereof is relevant or material to this proceeding.

5. The averments of paragraph 5 of the complaint are denied. From time to time plaintiff or his agents have requested permission of defendant to inspect certain records of defendant and the corporations listed in paragraph 2 of the complaint, but it is denied that defendant has always refused to permit such inspection. To the contrary, defendant has permitted plaintiff or his attorney or both to examine and make extracts from all records of defendant which plaintiff as a shareholder is entitled to inspect under the laws of Pennsylvania. The two most recent inspections took place on November 30, 1961 in New York City where, at the request of plaintiff, an officer of defendant made available to plaintiff's attorney certain basic data regarding defendant and its subsidiaries from which plaintiff could have determined any information he requires, and on March 7, 1962, in Philadelphia, Pennsylvania, at the annual meeting of shareholders of defendant, at which time plaintiff's attorneys once again inspected the list of shareholders of defendant. Several days prior to said annual meeting, defendant mailed to plaintiff and all other shareholders the annual report of defendant for

1961, a copy of which is attached hereto, made a part hereof and marked Exhibit "A".

6. It is admitted that plaintiff has averred his request for inspection and the alleged purposes therefor as set out in paragraph 6 of the complaint, but it is denied that any inspection in addition to that already made by plaintiff or on his behalf is necessary to achieve the purposes listed. It is further denied that the purposes listed are the true purposes of defendant.

7. It is admitted that in the second paragraph numbered "6" in plaintiff's complaint plaintiff claims to seek inspection.

(a) It is denied that the information furnished by defendant has been insufficient to disclose its true financial condition.

(b) It is admitted that defendant has paid the same dividend for the past seven years. The implication in the complaint that defendant's earnings have steadily increased during that period is denied; to the contrary, earnings have fluctuated throughout the period, and dividend payments have been maintained in a manner deemed by defendant's Board of Directors to be most beneficial to defendant and its shareholders.

(c) It is denied that any formal proceedings have been instituted against defendant or any of its subsidiaries by the Internal Revenue Service under Section 102 of the Internal Revenue Code of 1939, its successor sections (531-535) of the Internal Revenue Code of 1954, or any other section of either code. In

1961, a representative of the office of the Philadelphia District Director of Internal Revenue proposed the determination of a deficiency under Section 531 of the Internal Revenue Code of 1954 against one of defendant's subsidiaries; after conferences with a superior officer of the Internal Revenue Service the proposal was withdrawn.

SEPARATE DEFENSES

First Defense

The Court lacks jurisdiction over the subject matter.

Second Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Third Defense

Plaintiff's demand for inspection of defendant's books of account and other records is not made in good faith or for a reasonable purpose.

Wherefore, defendant requests that the complaint be dismissed and judgment entered in favor of defendant with costs according to law.

(s) Richard P. Brown, Jr.
(s) Ralph Earle, II
Attorneys for Defendant

Of Counsel:

Morgan, Lewis & Bockius
2107 Fidelity-Philadelphia
Trust Building
Philadelphia 9, Pennsylvania

[Exhibit Omitted.]

IV.

MOTION TO DISMISS

Defendant moves the Court to dismiss this action on the ground that the Court lacks jurisdiction over the subject matter, for the following reasons:

1. The only relief sought in this diversity action is an order to compel the defendant company to allow the plaintiff, a minority shareholder, to inspect certain corporate records. Such an order is in the nature of a writ of mandamus. Under the All Writs Act, this United States District Court does not have jurisdiction to issue an order in the nature of a writ of mandamus in a case in which that writ is the only relief sought.

2. The only factual averment in plaintiff's complaint regarding the existence of the jurisdictional amount is the averment that plaintiff owns 62 shares of stock in the defendant company and that the value of said stock is in excess of the sum of $10,000.00. The value of those shares, however, is not the amount in controversy in this litigation. The amount in controversy must be measured by the value of the right which plaintiff seeks to enforce, to wit, the right of inspection of the corporate records of the defendant company. That right of inspection is not subject to any monetary valuation. Since diversity jurisdiction depends upon the existence of an amount in controversy which is capable of such monetary valuation, no jurisdiction exists in this Court.

Richard P. Brown, Jr.
2107 Fidelity-Philadelphia Trust Building
Philadelphia, Pennsylvania
Attorney for Defendant

Of Counsel:
Morgan, Lewis & Bockius

V.
OPINION

Davis, J. March 21st, 1966

The plaintiff stockholders have instituted this diversity action solely to compel the corporate defendant to permit them "to examine [its] share register, [its] books of account and records, the records of the proceedings of its shareholders and directors, and the books and records of account of its subsidiary corporation."

The matter now before the court is the defendant's motion to dismiss the complaint for lack of jurisdiction over the subject matter. The defendant contends first of all that the United States District Court has no power to grant relief solely in the nature of a Writ of Mandamus and secondly that the matter in controversy does not exceed the jurisdictional amount of $10,000. Because of the court's decision on the first ground, it will be unnecessary to reach the second.

Since the early years of our Republic, the United States Supreme Court and the inferior federal courts have interpreted the jurisdictional statute, now 28 U.S.C. §1332[1]

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[1] (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

and the All Writs Act now 28 U.S.C. §1651,[2] as denying to what are now the Federal District Courts the right to issue a writ of mandamus or a writ in the nature of mandamus unless it is ancillary to some other relief sought. Knapp v. Lake Shore & Michigan Southern Railway, 197 U.S. 536 (1905); Rosenbaum v. Bauer, 120 U.S. 450 (1887); McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821); McIntire v. Wood, 11 U.S. (7 Cranch) 503 (1813); Marshall v. Crotty et al., 185 F. 2d 622 (1st Cir. 1950); Fineran et al. v. Bailey, 2 F. 2d 363 (5th Cir. 1924); Newark Morning Ledger Co. v. Republican Co., 188 F. Supp. 813 (D. Mass. 1960); United States ex rel. Barmore v. Miles, 177 F. Supp. 172 (W.D. Mich. 1959); Robert Hawthorne, Inc. v. United States Department of Interior, 160 F. Supp. 417 (E.D. Pa. 1958); Rosen v. Alleghany Corp., 133 F. Supp. 858 (S.D. N.Y. 1955). See "Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts; A Study in Procedural Manipulation", 38 Colum. L. Rev. 903 (1938).

In McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821), the plaintiff brought a diversity action for a writ of mandamus against a register of the United States land office in Ohio to compel him to deliver certain documents of title. Although the plaintiff argued that the existence of diversity of citizenship was sufficient to allow the adjudication of the suit in federal court, the decision of the Supreme Court was to the contrary. It held that the trial

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[2] The All Writs Act provides that the lower federal courts:

"May issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

court had no power over a pure mandamus proceeding because the writ of mandamus was not "necessary for the exercise of its jurisdiction" under the All Writs Act and could not be used as a basis to obtain jurisdiction not already possessed. The Court asserted:

> "It cannot be denied, that the exercise of this power is necessary to the exercise of jurisdiction in the court below, but why is it necessary? Not because that court possesses jurisdiction, but because it does not possess it. It must exercise this power, and compel the emanation of the legal document, or the execution of the legal act by the register of the land office, or the party cannot sue.
>
> "[The All Writs Act] could only have been intended to vest the power now contended for, in cases where the jurisdiction already exists and now where it is to [be] courted or acquired, by means of the writ proposed to be sued out."

In Rosenbaum v. Bauer, 120 U.S. 450, 456-57 (1887), a diversity case where the right of action rested on a state statute as in the case at bar, the Supreme Court specifically asserted that the All Writs Act restricted that the federal trial court's diversity jurisdiction over "all suits of a civil nature at common law or in equity" by "oper-at[ing] to prevent original cognizance . . . of a proceeding by *mandamus* not necessary for the exercise of a jurisdiction which had previously otherwise attached." See also Knapp v. Lake Shore & Michigan Southern Railway Co., 197 U.S. 536, 541-42 (1905); McIntire v. Wood, 11 U.S. (7 Cranch) 503, 504 (1813) . . . Although 28 U.S.C. §1332(a) now reads that the district courts have jurisdiction of

"all civil actions" with certain exceptions not relevant here, these words were merely substituted for the earlier wording in order to conform to the language of Rule 2 of the Federal Rules of Civil Procedure. They do not in any way change the meaning of the earlier phraseology. Rosen v. Alleghany Corp., 133 F. Supp. 858 (S.D. N.Y. 1955).

Whether the relief sought is in the nature of a writ of mandamus must depend on the historical use of the writ at the time of the enactment of the jurisdictional statute and the All Writs Act and not on the particular appellation given to the remedy or relief afforded by the state law which would otherwise apply to the case. The federal statutes restrict the mandamus power of the district courts and a state's characterization of the form of the cause of action or relief can hardly expand or limit the courts' jurisdiction. See Rosenbaum v. Bauer, McClung v. Silliman, McIntire v. Wood, supra. In any event, the question here is moot since both the Pennsylvania and the general common law remedy to compel the inspection of corporate records is mandamus. Sprang v. Wertz Engineering Company, 382 Pa. 48, 51, 114 A. 2d 143 (1955); Taylor v. Eden Cemetery Co., 337 Pa. 203, 10 A. 2d 573 (1940); Hodder v. George Hogg Co., 223 Pa. 196 (1909); 5 Fletcher, Cyclopedia Corporations, §§2250-2252 (Rev. ed. 1952).

Whatever the merits or demerits of the interpretation given to statutes 28 U.S.C. §1332 and the All Writs Acts, the courts have adhered to this restriction on their power even though one decision characterized it as "an outworn technicality." Marshall v. Crotty, 185 F. 2d 622, 627 (1st Cir. 1950). In 1962, the Congress took cognizance of this

recognized limitation[3] and passed a statute, 28 U.S.C. §1361, providing the district courts with jurisdiction in mandamus actions against officials of the United States government. However, it did not broaden the act to include such actions against private persons or corporate officers and to this extent the previous decisional law stands.

A number of relatively recent cases which have faced the identical issue now before this court have held that the federal district courts do not have the power to compel a defendant corporation to allow a shareholder to examine its books and records since the relief sought is in the nature of mandamus. Newark Morning Ledger Co. v. Republican Co., 188 F. Supp. 813, 814 (D. Mass. 1960); Selman v. Colborn, 143 F. Supp. 112, 113 (S.D. N.Y. 1956); Breswick & Co. v. Briggs, 136 F. Supp. 301, 303-04 (S.D. N.Y. 1955); Rosen v. Alleghany Corp., 133 F. Supp. 858, 864-65 (S.D. N.Y. 1955). These cases are controlling of the instant action.

Nevertheless, the plaintiff relies on Hertz v. Record Publishing Company, 219 F. 2d 397 (3d Cir. 1955), cert. denied 349 U.S. 912 for the proposition that the federal district courts have such jurisdiction. In that case, one plaintiff had sold 150 shares of stock of the defendant corportion to the other plaintiff. They brought suit to compel the defendant to issue a stock certificate to the plain-

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[3] S. Rep. No. 1992, 87 Cong., 2d Sess. 2784 (1962); See Byse, "Proposed Reforms in Federal 'Nonstatutory' Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus," 75 Harv. L. Rev. 1479 (1962); "Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts; A Study in Procedural Manipulation", 38 Colum. L. Rev. 903 (1938).

tiff vendee, an act which the defendant had refused to perform on the ground that the plaintiff vendor had not been the owner of the stock and thus could not transfer what he did not own. The corporation made the argument that the court lacked jurisdiction because a writ of mandamus was the relief sought. The court held, however, that the action was really one in equity to determine title to the stock and that any issuance of a writ of mandamus would only be an aid to the adjudication of that matter.

The case at bar is not analogous to Hertz, for all that is requested here is the right to scrutinize the books and records of the defendant where the traditional remedy has been mandamus. Unlike Hertz, there is no other claim before this court to which any relief in the nature of mandamus might be ancillary.

The undersigned is not unmindful of the very recent decision of The Susquehanna Corporation v. General Refractories Co. et al., C.A. No. 39616, E.D. Pa., February 14, 1966, aff'd per curiam, No. 15787 and 15791, 3d Cir. Mar. 2, 1966 (Hastie, J., dissenting), where a corporation was enjoined from holding a stockholders' meeting unless and until the plaintiff stockholder had been allowed to scrutinize its books and records. There, however, the court specifically found that the remedy of mandamus, being at law, was inadequate due to the imminence of the meeting at which the stockholders were to vote upon a certain transaction that the plaintiff opposed. The court then invoked its equitable powers because of insufficiency of the legal remedy. The case at bar is clearly distinguishable since no such urgency or danger of irreparable harm is alleged and there is no showing that the remedy of mandamus is inadequate.

Finally the plaintiff argues that if this court has no mandamus power in this case the only forum in which this action can be brought are the courts of Pennsylvania, a result, it is contended, that would undermine the doctrine of Erie v. Tompkins, 304 U.S. 64 (1938), Guarantee Trust Co. v. York, 326 U.S. 99 (1945), and their progeny. The short answer to this contention is the right of Congress to restrict as it sees fit the diversity jurisdiction and remedies of the inferior federal tribunals. The cases talk in terms of this kind of a limitation imposed by Congress on the power of the federal courts to issue mandamus so that the doctrine of Erie v. Tompkins, which presupposes jurisdiction, has no effect on this restriction. See Knapp v. Lake Shore Railway, 197 U.S. 536, 542 (1905); McIntire v. Wood, 11 U.S. (7 Cranch) 503, 504 (1813).

While this court would agree that the limitation upon its power to grant a remedy in the nature of mandamus is an unrealistic anomaly, any change in the law is a matter for the Congress and not this Court. The great weight of precedent especially from the Supreme Court controls our decision, and we must, albeit, reluctantly, dismiss the complaint.

By the Court,
John Morgan Davis
J.

ORDER

And Now this 21st day of March 1966, it is hereby Ordered that the defendant's motion to dismiss the Com-

plaint for lack of jurisdiction over the subject matter be Granted.

By the Court,
John Morgan Davis
J.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 15901

J. DAVID STERN and SOPHIE L. SIEGEL,*
Appellants

v.

SOUTH CHESTER TUBE COMPANY,
Appellee

Appeal From the United States District Court for the Eastern District of Pennsylvania.

Argued November 3, 1966

Before Ganey, Smith and Freedman, *Circuit Judges.*

VI.

OPINION OF THE COURT

(Filed May 25, 1967)

By Smith, *Circuit Judge.*

This appeal is from the dismissal of a complaint in which the only relief sought by the appellant was the en-

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* This appellant has withdrawn from the litigation.

forcement of his statutory right as a stockholder to examine the books and records of account of the corporate appellee and its subsidiaries. Business Corporation Act, 15 P.S. §2852-308B. The right is enforceable in an original action of mandamus in the court of common pleas of the county in which the corporation has its principal place of business. 12 P.S. §1911; Goldman v. Trans-United Industries, Inc., 171 A. 2d 788 (Sup. Ct. Pa. 1961). Similar actions are not maintainable in the federal courts because of the limit on their jurisdiction.

Although the writ of mandamus has been abolished by the Federal Rules of Civil Procedure, rule 81(b), 28 U.S.C.A., the procedural relief available in lieu thereof is still governed by the "All Writs Act", 28 U.S.C.A. §1651. The statute provides that the federal courts "may issue all writs necessary or appropriate In Aid of Their Respective Jurisdictions and agreeable to the usages and principles of law." (Emphasis added.)

It has been uniformly held in a long line of decisions that a federal court is without authority to issue a writ of mandamus except in aid of its jurisdiction already acquired under an applicable federal statute. Knapp v. Lake Shore Railway Co., 197 U.S. 536, 541-543 (1905); Covington Bridge Co. v. Hager, 203 U.S. 109, 111 (1906); Marshall v. Crotty, 185 F. 2d 622, 626 (1st Cir. 1950). There are other cases in point but we see no reason to cite them in this opinion. The relief here sought by the plaintiff is plainly not ancillary to a suit now pending in the district court. The issuance of the writ would not be in aid of the lower court's jurisdiction; it would simply terminate the litigation.

The defendant argues that jurisdiction having been acquired by reason of diversity of citizenship and a requisite amount in controversy, the district court had authority to issue a writ of mandamus conformably to State practice. This argument is untenable. The jurisdiction of the district courts under §1332(a) of 28 U.S.C.A. is limited to "civil action".[1] Albanese v. Richter, 161 F. 2d 688 (3rd Cir. 1947). An original proceeding in mandamus is not a "civil action" within the meaning of the said statute. Insular Police Commission v. Lopez, 160 F. 2d 673, 677 (1st Cir. 1947), cert. den. 331 U.S. 855; Marshall v. Crotty, supra. It is a special proceeding in which a court is called upon to exercise its prerogative power. The only such power held by the federal courts is that conferred upon it by the "All Writs Act," supra, and this is subject to the restrictions of the statute. It was held in Knapp v. Lake Shore Railway Co., supra, that an earlier counterpart of the present statute did not "confer power on the [lower] courts to issue mandamus in an original proceeding."

We recognize that a federal court may enforce a state-created substantive right, and to do so fashion an appropriate remedy. Cf. Guaranty Trust Co. v. York, 326 U.S. 99, 105-107 (1945). However, we are not here concerned with the question of remedy but one of jurisdiction. The general jurisdiction of the district courts is limited and defined strictly by statute, in this case by

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[1] The phrase "civil actions" has been substituted for the earlier language "suits of a civil nature, at common law or at equity." The change was not intended to enlarge the jurisdiction of the federal courts in cases of mandamus. Marshall v. Crotty, supra, 627.

§1651(a) of Title 28 U.S.C.A., supra. United States v. First Federal Savings & Loan Ass'n., 248 F. 2d 804 (7th Cir. 1957), cert. den. 355 U.S. 957. When thus limited and defined it cannot be extended by local statute. "The basic purpose of §1651, and of its statutory predecessors, was to assure to the various federal courts the power to issue appropriate writs . . . of an auxillary nature in Aid of Their Respective Jurisdictions as Conferred by other provisions of the law." (Emphasis added). In Re Previn, 204 F. 2d 417, 418 (1st Cir. 1953). It seems to me that the issuance of a writ of mandamus in this case would violate the plain statutory limitation on the lower court's jurisdiction.

The judgment of the district court will be affirmed.

Judge Freedman concurs in this opinion.

Ganey, *Circuit Judge*, dissenting.

In this country federal jurisdiction was originally vested in the courts of the United States under the Judiciary Act of 1789. By the Eleventh Section thereof the courts of the United States were vested with original jurisdiction of "all suits of a civil nature at common law or in equity" where the amount in dispute exceeded the sum of $500 and the parties were citizens of different states. Present jurisdiction is vested under 28 U.S.C.A. §1332(a)(1) in which, under the 1948 revision of this section, the words "civil action" were substituted for the words "suits of a civil nature", but this was done only to conform to Rule 2 of the Federal Rules of Civil Procedure and the change had no substantial effect on the

jurisdiction of the courts. Rosen v. Allegheny Corp., 133 F. Supp. 858, 865. Here, there is a requisite citizenship between different states among the parties and it is submitted that the aggregate value of the plaintiff's sixty-two shares of stock in the company is in excess of $10,000 and, accordingly, the amount in controversy is measured by the value of the shareholder's investment and, therefore, the jurisdictional amount is well pleaded. Lapides v. Doner, 248 F. Supp. 883, 895.

The focal point of our inquiry here is since the action laid in the complaint is one for mandamus whether, in the exercise of the court's jurisdiction, it has the power to dispose of it.

There can be no denying the assertion by the majority, as it is abundantly evident that under the All Writs Act, 28 U.S.C.A. §1651, where mandamus is sought by way of relief under a federal statute, it will not lie and that it can only be invoked in furtherance of a jurisdiction already acquired. This is established by an almost unanimous authority beginning with McIntire v. Wood, 7 Cranch 504, through Smith v. Allen, 1 Pet. 453; Graham v. Norton, 15 Wall. 427; Bath County v. Amy, 80 U.S. 244; Knapp v. Lake S. & M. S. Ry., 197 U.S. 537, to Covington and Cincinnati Bridge Co. v. Hager, 203 U.S. 108, 111, the reason stated being that the courts of the United States, in construing the All Writs Act, have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ.

Likewise, the courts have followed like reasoning in diversity cases relying on the same reasoning given in McIntire v. Wood, supra, and the other cases following it, citing County of Greene v. Daniel, 102 U.S. 187; Davenport

v. County of Dodge, 105 U.S. 237; Rosenbaum v. Bauer, 120 U.S. 450, though, here, there was a dissent which applied the conformity statute then in effect, §914, Rev. Stat., and it is suggested that the majority may have felt that since the conformative statute was a federal statute, the same restriction on the jurisdiction of the court applied as in all the other cases theretofore.

However, in spite of this great weight of authority, it is my opinion that the writ should issue. In so holding, it is unnecessary to breast the great tide of authority hereinbefore mentioned, for, in my judgment, in construing these diversity cases, the courts have never accorded Erie R.R. v. Tompkins, 304 U.S. 64, its full authority in this field, nor have they given proper acceptance to its complete potential. It is submitted that a proper basis for allowing the issuance of the writ is to give full effect to the power of a federal court expressed therein. This for the reason that in the growing complexities of modern business, through mergers and absorptions of corporate entities which spread over many states, the federal courts should not be shackled from granting relief as here, but should embrace, within the orbit of Erie R.R. v. Tompkins, supra, an expansive reach in order to meet the growing needs of the substantive rights embodied in state statutes and grant a remedy, if one is provided by state statutes, as in our case, and, even in its absence, fashion a remedy of its own under its inherent equity power.

The instant case provides an excellent example for, under the Pennsylvania Business Corporation Law, a substantial civil right is given to a shareholder. Further, this substantial civil right given by §308(b) of the Busi-

ness Corporation Law of May 5, 1933, P. L. 364, is properly enforceable in Pennsylvania by the legal action of mandamus. Hagy v. Premier Manufacturing Corp., 404 Pa. 330. In a federal court, under Erie R.R. v. Tompkins, supra, sitting as a state court, the granting of the writ exercises no involvement of the All Writs Act or its successor statutes and, accordingly, no power to do so flows therefrom, for, irrespective of it, the court has full power to give effect to a substantial right given by a state and to give to it the enforcement thereof granted by the highest decisional court in that state and, accordingly, draws on no federal power for its enforcement, but gives effect to authority rooted in state law and thereby merely follows state procedure.

An indication of this approach finds basis in this court. In Susquehanna Corp. v. General Refractories Co., 250 F. Supp. 797, 802, the lower court spoke as follows: "But even if that were not so [discussing the insufficient length of time between the granting of the writ and the stockholders' meeting], it is by no means certain that the federal diversity court could not grant mandamus when that remedy would be granted by a state court as a matter of state law. The cases defendants cite, holding mandamus to be beyond the powers of the federal courts, do not specifically consider the question in the context of a state mandamus statute sought to be applied in the federal court under Erie [Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188]. As Loss remarks, 'on the assumption that the equitable remedial rights doctrine is dead . . . the statutory case is easy: the federal courts will use the state statute. . . .' 2 Loss 1005. But see Newark Morning Ledger Co. v. Republican Company, 188

F. Supp. 813 (D. Mass. 1960). For Erie purposes, the 'remedy' of mandamus may be a matter of substantive state law which the diversity court would be bound to apply." The lower court was affirmed by this court in a per curiam opinion at 356 F. 2d 985. It is to be noted here that in Newark Morning Ledger Co. v. Republican Co., 188 F. Supp. 813, this approach under Erie R. R. v. Tompkins, supra, was not taken into consideration by the court.

Likewise, in Hertz v. Record Publishing Co., 219 F. 2d 397, where mandamus was permitted because it was in aid of a jurisdiction previously acquired, nevertheless stated in footnote 2, page 398, by way of dictum, "However, even if title to stock were in issue, the district court had jurisdiction to issue the order. Under Pennsylvania law a shareholder has the substantive right to have his stock transferred on the corporation's books and to have a new certificate issued. Mandamus is available to him by statute." Accordingly, it would seem proper that this court should now come full cycle and hold that a substantive civil right granted by a state statute which the highest court of that state, in its decisional rulings, holds might be enforced by a mandamus statute of that state, should not only recognize the substantive right granted under the statute, but, as well, the remedy provided by the state statutes, in a diversity case.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed March 21, 1966, be, and the same is hereby affirmed, with costs.

Attest:

Thomas F. Quinn,
Clerk.

May 25, 1967